Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-719

REPRODUCTIVE SERVICES, INC. and
REPRODUCTIVE ASSOCIATES, P.A.,
Petitioners,

v.

HONORABLE DEE BROWN WALKER,
District Judge of the 162nd Judicial District Court
of Dallas County, Texas,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF OF CLAUDIA E. LOTT ON BEHALF OF RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2-5
Questions Presented	5
Statute or Regulation Involved	5
Statement	5-8
Argument	8-16

LIST OF AUTHORITIES

Rules and Statutes

	Page
Rule 167, *T.R.C.P.*	3
Article 4590(i), *V.A.T.S.*	6
Section 17.41, *et seq. Business and Commerce Code*	6

Cases

Barrows v. Jackson, 346 U.S. 249 (1953)	8
Bellotti v. Baird, 428 U.S. 132	10
Cobbledick v. U.S., 309 U.S. 323 (1939)	4
Crane v. Tunks, 160 Tex. 182, 328 S.W. 2d 434 (1959)	4, 16
Doe v. Bolton, 410 U.S. 179 (1973)	12
Liberty Warehouse Co. v. Burley Tobacco Growers Coop., 276 U.S. 71 (1927)	8
Planned Parenthood v. Danforth, 428 U.S. 52 (1976)	10
Roe v. Wade, 410 U.S. 113 (1973)	11
Singleton v. Wulff, 428 U.S. 106 (1976)	9
State of Connecticut v. Menillo, 423 U.S. 9 (1975)	12, 13
Staub v. Baxley, 355 U.S. 313 (1958)	3
Tally v. TEIA, 129 Tex. 134, 102 S.W. 2d 180 (1937)	4
Wallace v. Briggs, 162 Tex. 485, 348 S.W. 2d 523 (1961)	16

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OPINIONS BELOW

The Orders of the District Court appear at pages 10a and 18a of the Appendix to the Petition. The Orders of the Supreme Court of Texas appear at pages 6a, 7a and 8a of the same Appendix. All such Orders are unreported.

JURISDICTION

Mrs. Lott respectfully submits that this court lacks jurisdiction to grant the relief requested by Petitioners pursuant

to 28 *U.S.C.*, 1257(3), or upon any other basis. In order to demonstrate the accuracy of this contention a brief review of the procedural context of this case is required. Mrs. Lott originally sued the Petitioners and sought a temporary injunction to prohibit numerous alleged violations of Texas laws regarding health regulations. Mrs. Lott caused to be issued a Subpoena Duces Tecum for the temporary injunction hearing in which the Petitioners were required to produce records of treatment of certain named individuals, including Mrs. Lott, who had suffered either death or serious complications as a result of the Petitioners' conduct.[1] (Pet. App. 27a). The Petitioners filed a Motion to Quash this Subpoena which was overruled on June 15, 1978 by the District Court. (Pet. App. 23a). While the temporary injunction hearing proceeded, the Petitioners sued out a Writ of Mandamus to the Supreme Court of Texas, docketed number B-7680 which was filed June 16, 1978. (Pet. App. 48a). Thereafter, the Petitioners sued out yet an additional Writ of Mandamus docketed number B-7694, which was filed June 21, 1978. (Pet. App. 37a). The following day, June 22, 1978, the Petitioners as Defendants agreed and stipulated to the entry of an agreed temporary injunction specifically prohibiting the acts complained of by the Plaintiff and the intervenor, State of Texas. The following day the Supreme Court of Texas denied leave to file a Petition for Writ of Mandamus in cause number B-7680 (Pet. App. 6a) and in cause number B-7694 (Pet. App. 7a). On July 10, 1978, Mr. Justice Brennan in chambers issued a stay as to the "Order" of the Supreme Court of Texas without specifying which or what Order was in fact to be stayed. Thereafter, on July 17, 1978, Mr. Justice Brennan dissolved his original Stay Order (Pet. App. 3a) in

[1]References to the body of the Petition will be designated "Pet." and references to the Appendix to the Petition will be designated "Pet. App."

a chambers opinion. On August 1, 1978, on motion of the Plaintiff and the State of Texas the trial judge entered an Order to produce documents for discovery pursuant to Rule 167, *T.R.C.P.* (Pet. App. 10a). Thereafter, on August 21, 1978, Mr. Justice Brennan again in chambers granted yet another stay pending the filing of Writ of Certiorari. Petitioners are before this Court complaining of the denial of the Motion to Quash the original Subpoena (Pet. p. 11) and of "the Order" [presumably the Order of August 2, 1978]. (Pet. p. 13). With this background the Petitioners assert that ". . . The federal questions are now squarely before this Court . . ." (Pet. p. 13).

Petitioners' position in this regard is indeed a curious one given the procedural and substantive context of this appeal. Petitioners' original contentions relating to the Subpoena during an evidentiary hearing were rendered completely moot by the Petitioners' agreement to the entry of the temporary injunction. Since both Motions for leave to file Petitions for Writs of Mandamus in the Supreme Court concerned the Subpoena and evidentiary hearing in progress and since the agreement of the Petitioners precluded the necessity for further evidentiary production in that hearing, the Supreme Court of Texas had ample non-federal grounds for denying their requested mandamus, the most logical being that a determination of the cause was unnecessary by reason of mootness. Petitioners seem to recognize that this circumstance standing alone may well be fatal to the relief they seek before this Court. See, *Staub v. Baxley*, 355 U.S. 313 (1958). (Pet. p. 13, note 10). There can be little doubt that the determination of the narrow issue presented by the Subpoena Duces Tecum is now legally and factually moot. It is, of course, axiomatic that this Court will not extend its jurisdiction to the determination of such issues. Procedurally, therefore, the

only remaining complaint of the Petitioners is the discovery Order of the trial court entered August 2, 1978 and indeed it is toward this Order that Petitioners advance most of their argument. Again, however, no Federal question is properly before this Court as to the discovery Order. Under Texas law, a discovery order is considered interlocutory and non-appealable. *Tally v. TEIA.* 129 Tex. 134, 102 S.W. 2d 180 (1937). This Court has consistently refused to review such interlocutory orders for obvious reasons, including the absence of full factual development to limit, define, sharpen and provide perspective on the issues presented and this Court's historical predisposition to avoid piecemeal review of litigation. *Cobbledick v. U.S.*, 309 U.S. 323 (1939). In addition, however, it should be noted that there has been no attempt by the Petitioners to resort to or let alone exhaust an available state remedy if their claims before this Court should be considered meritorious. Since Mr. Justice Brennan's original Stay Order stayed the judgment of the Supreme Court of Texas denying an application for Writ of Mandamus only in regard to a Subpoena Duces Tecum (an issue which was completely moot when the Supreme Court of Texas ruled) and since the discovery Order of the trial court had never been reviewed by the intermediate or high Court of Texas, it was incumbent upon the Petitioners notwithstanding the in-chambers opinion of Mr. Justice Brennan to seek to avail themselves of the state remedy for the abuses they claimed. There has been no attempt whatsoever by the Petitioners to seek review of the discovery Order which would have been available if their contentions were meritorious under the Texas All Writs Act or by additional Application for Writ of Mandamus as to the discovery Order itself.[2] Petitioners "respectfully peti-

[2] *E.g., Crane v. Tunks*, 160 Tex. 182, 328 S.W.2d 434 (1959). See, also, *Southern Bag & Burlap Co. v. Boyd*, 120 Tex. 418, 38 S.W.2d 565 (1931).

tion this Court for a Writ of Certiorari to review the Order and judgment of the Supreme Court of Texas denying review of an Order of the District Court of Dallas County . . . . ." (Pet. p. 1). This Court can grant no such relief. The Supreme Court of Texas has never been asked or given an opportunity to review the Order complained of nor has the Supreme Court of Texas "denied review" of the Order complained of. Under such circumstances the most rudimentary jurisdictional prerequisites for case and controversy or Federal question are absent.

QUESTIONS PRESENTED

I. Whether this Court has jurisdiction to grant the Petition for Writ of Certiorari to the Supreme Court of Texas under the facts and circumstances of this Court.

II. Whether the Petitioners have standing to assert claimed rights or privileges on behalf of their clients.

III. Whether the Petition presents a new, serious or important Federal question, a conflict of decision and/or whether the judgments of the Courts below were correct.

STATUTE OR REGULATION INVOLVED

There is no specific statute which requires interpretation to dispose of the Petition.

STATEMENT

The tenor of the Petitioners' argument is to the effect that they are presumptively entitled to the benefit of the doubt as to all aspects of all factual references made before this Court. Mrs. Lott and presumably the State encounter considerable difficulty in refuting the factual claims of the Petitioners such as those stated at pages 8, 9 and 10 of the Petition because the proof which would establish the

falsity of many such references has not as yet been adduced in the cause. It will suffice to say that there will be an evidentiary dispute as to numerous factual statements of the Petitioners, including but not limited to whether or not Reproductive Services, Inc. is in fact a lawfully operated "nonprofit Texas corporation", whether Reproductive Associates, P. A. is in fact a "professional corporation" at all, when and under what circumstances Reproductive Services and Reproductive Associates began business, how many women have died or suffered serious complications as a result of the combined conduct of the Petitioners, whether the Petitioners agreed to and carried out a plan whereby admittedly incompetent individuals would serve as "counselors" to the "client" and whether equally incompetent and unlicensed individuals would provide substantially all of the medical care given the patient other than the abortion procedure itself, which was performed by a physician. Apparently there will even be dispute as to what cause of action Mrs. Lott and/or the State can assert as against the Defendants. The State of Texas and the Plaintiff have sued the Petitioners for violation of the Texas Consumer Protection — Deceptive Trade Practices Act, Section 17.41, *et seq.* of the *Business and Commerce Code* of the State of Texas. Petitioners continually suggest they are not subject to regulation under that law by virtue of Article 4590(i), *V.A.T.S.* (Pet. p. 9, note 6). Petitioners omit to discuss that they do not qualify as a "health care provider" under Section 1.03(a) (3) of Article 4590(i), *V.A.T.S.* (Pet. App. 60a). Accordingly, the exemption granted by Section 12.01 of Article 4590(i) *V.A.T.S.* does not apply. (Pet. App. 65a). Mrs. Lott and the State have not sued the physicians who were involved in the case and as of this date no claim of negligence has been asserted. The Plaintiff and the State allege and will prove a conspiracy by the

Petitioners and numerous individuals to violate virtually every licensing law which regulates the delivery of health care services under Texas law. Mrs. Lott respectfully disagrees that considerations of the merits of her case and that of the State "are not relevant". (Pet. p. 10, note 7). A final and important consideration is that wherever possible the Petitioners before this Court seek to cast themselves in the role of an unfortunate victim of a totally arbitrary abuse of discretion by the trial judge and presumably by the entire Supreme Court of the State of Texas. For example, at page 4 of the Petition, after discussion of sections of the discovery Order, Petitioners state they they ". . . are not granted any reciprocal rights for rebuttal purposes . . ." Petitioners do not linger to inform the Court that they never requested any such rights nor objected to their omission in the trial court. Next the Petitioners state in a footnote at the same page that "there are no standards . . . established for ruling upon an application to inspect the original records . . ." Apparently the gravamen of the Petitioners' complaint in regard to standards is that the trial court failed to specifically cite and refer to those portions of the controlling case authority which would guide the trial court's decision as to whether or not to grant inspection of documents. The entire substance of the Petitioners' position before this Court is predicated upon the hypothetical supposition that the trial court will not properly and accurately follow the rules and pronouncements of this Court in discharging its judicial responsibilities which is a proposition which itself is sufficient to justify denial of the Petition. Petitioners complain as to many provisions of the Order which they say might permit unwary individuals to be interviewed, etc. The Petitioners have not at any time requested any protective order from the trial court as to such eventualities nor has the trial court

permitted access to any information for any persons to learn the names of any persons nor has the trial court ruled or set up, as of this date, a procedure as to how or under what circumstances discovery shall proceed. In short, the Petitioners have constructed nothing more than a hypothetical strawman.

ARGUMENT

I. This Court lacks jurisdiction to grant the Petition for Writ of Certiorari.

This argument has previously been made at pages 1 through 5, *supra.*

II. Petitioners lack standing to assert claimed rights or privileges on behalf of their clients.

Historically, this Court has required a clear showing by the party seeking review of the State court decision that enforcement of the challenged judgment would deprive it personally — not someone else — of some right arising under the Constitution or laws of the United States. *Liberty Warehouse Co. v. Burley Tobacco Growers Coop,* 276 U.S. 71 (1927). The federally protected right in question must be one of the party and not a third person. *Barrows v. Jackson,* 346 U.S. 249 (1953). In *Barrows* the only exception to this rule was enunciated as an instance in which "the reasons which underlie our rule . . . are outweighed by the need to protect . . . fundamental rights which would [otherwise] be denied." 346 U.S. 239, 257. More recently this Court has spoken to this question in *Singleton v. Wulff,* 428 U.S. 106 (1976). There, Mr. Justice Blackmun speaking for a plurality of the Court, enunciated two criteria to determine standing in *jus tertii* cases:

> "The first is the relationship of the litigant to the person whose right he seeks to assert . . . 428 U.S. 106. The other . . . is the ability of the third party to assert his own right . . . 428 U.S. 115, 116."

In the same case this Court rejected the contention that its decision conferred unilateral standing for a provider of services, 428 U.S. 120, preferring instead to view each case in regard to standing on an individual basis. The issue of standing in the pure constitutional sense of the term is one of the most sophisticated and complex concepts of the law. It is, thus, not an area into which less able scholars should proceed. Accordingly, it will suffice to say that by any objective consideration this case presents both historically and under *Singleton v. Wulff* a salutary example of the absence of standing on the part of the Petitioners. First and foremost, the Petitioners do not seek to protect the rights to privacy of its "clients". Objectively reduced to simple terms, the Petitioners seek to establish a federally created privilege to protect themselves. This consideration raises several additional grounds for denial of standing. Briefly stated, they are as follows: first, the Petitioners have a direct conflict of interest with the "client" whose privacy they supposedly protect. The adversity of interest is shown on the face of the record as indicated above and is elucidated by the positions of the parties before this Court. Plaintiff Lott, whose privacy the Defendants sought to protect initially, almost at the expense of her life, seeks recovery in her own right and on behalf of a class of persons who have admittedly been injured as the result of the Defendants' conduct. By wrapping themselves in the penumbra rights of its victims, the Petitioners insulate themselves from potential liability. It is interesting to note that the Petitioners, in a position of a classic conflict of interest, lamely assert that revelations in strictly controlled discovery proceedings to the State of Texas or representatives of Plaintiff's class would do violence to the privacy of the patient while the Petitioners' unabated concealment of such facts would not. Such contentions are best left for advanced schools of sophistry to defend. Second, Petitioners

lack a confidential relationship with those it seeks to represent. The only relationship the Petitioners have with their clients is that the client had the misfortune of selecting the Petitioners to supervise the abortion process. The evidence in this case from the physician who performed the procedure in question, showed that the doctor had virtually no contact with the patient whatsoever prior to physically performing the abortion, and had no contact with her thereafter, if possible The evidence before the trial court in this case established that the main contact which the "client" had with the Petitioners was through a series of incompetent and unlicensed individuals practicing the healing arts in virtually every instance without benefit of the most rudimentary training or certification. This case is substantially identical in terms of clinic operation to that of *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), and *Bellotti v. Baird*, 428 U.S. 132 (1976). In the *Danforth* case, Mr. Justice Stewart in his concurring opinion noted in footnote 2 at 428 U.S. 91, given such impersonal circumstances, it was "... unlikely that . . . [the patient] will obtain adequate counsel and support from the attending physician . . ." In short, virtually every case in which the Court has found an exceptional circumstance to justify standing to assert a third-party's rights, there has been the highest position of trust and confidence between the absent third person and the party asserting his rights. Such a relationship is conspicuous for its absence here. Finally, the Petitioners lack the proper adversary posture to effectively assert third-party rights. In virtually every major pronouncement of this Court the party having standing to assert third-party rights has itself vigorously and aggressively sought to vindicate the rights of the third party in a primary sense. Here, the Petitioners come forward not with a sword but with a shield. Petitioners' primary concern is to protect themselves from disclosure of misconduct which will lead to further liability in a purely

defensive posture. The supposed rights of the patient in the context of the Petitioners' position are pursued in a secondary and ancillary fashion as an afterthought. Such a circumstance does not assure the adequate representation of the absent third party nor the necessary clear adversity of interest which will sharply define the controversy. Indeed, this case presents a classic example of the absence of standing. Petitioners respond to this argument by stating that the rights of their patients must be protected by them or "not at all". (Pet. p. 10, note 8). Petitioners have never requested that the Court appoint an attorney or guardian ad litem to protect the rights of the Petitioners' patients nor have the Petitioners ever shown any interest in an impartial, disinterested third-party playing any role in that context.

III. The Petition fails to present a new, serious or important Federal question or a conflict of decision and the result in the Courts below was a correct one.

A. *There is no important Federal question presented nor any conflict in decision to justify granting the Petition.*

The Order in question when read as a whole discloses the deepfelt and fundamental concern of the trial court for the privacy of the individuals involved. In 1973, when this Court recognized the right of a woman to control her own destiny in regard to abortion in *Roe v. Wade*, 410 U.S. 113 (1973), the policy consideration which prompted this Court's action was a sound and humane one. No woman should be denied access to medical treatment to terminate an unwanted pregnancy until the interest of the state and the unborn fetus constitutionally predominate. The purpose and intended effect of *Roe v. Wade* was to recognize the thousands of young women across the United States, married or single, who find themselves pregnant with a child which they cannot or do not wish to carry to term. *Roe* teaches that abortion should not, cannot, and must not be relegated to the garret or the

unsavory circumstances from which it originated. Indeed, the very Hippocratic Oath referred to by the Petitioners in support of their claim to privacy condemns abortion because historically abortion performed by the incompetent or inept or in unsanitary conditions produces a predictable increase in maternal mortality and morbidity. Illustrative is *State of Connecticut v. Menillo*, 423 U.S. 9 (1975), where the Connecticut Supreme Court, relying on *Roe v. Wade* and *Doe v. Bolton*, 410 U.S. 179 (1973), had reversed a conviction of layman who performed a criminal abortion under Connecticut statute. In rejecting that interpretation and returning Mr. Menillo to his rightful place in the penitentiary, this Court, in a *per curiam* opinion, stated in part:

> ". . . the State's interest in maternal health is predicated upon the first trimester abortion being as safe for the woman as normal childbirth at term, and that predicate holds true only if the abortion is performed by medically competent personnel under circumstances insuring maximum safety for the woman . . ."

The Court went on to state:

> ". . . so far as this Court and the Federal Constitution are concerned, Connecticut statute remains fully effective against the performance of abortions by non-physicians . . ." 423 U.S. 8, 9.

Moreover, this Court in *Roe* expressly stated:

> "The State has a legitimate interest in seeing to it that abortion, like any other medical procedure is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of aftercare, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal 'abortion mills' strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed . . ." 410 U.S. 113 at 150.

It may be safely said that the entire body of law developed by this Court in regard to abortion has been designed primarily to protect the physical well-being of the patient and to minimize her difficulty in obtaining a constitutionally protected abortion. This Court has never countenanced the incompetent counselors or physicians demonstrated to operate the Petitioners' facilities and expressly rejected the idea that such persons may, under the guise of abortion, protect themselves from liability, criminal or civil, by wrapping themselves in the constitutionally protected rights of their victims. *State of Connecticut v. Menillo, supra.* Unless the State and injured persons are able to discover the misconduct of the Petitioners there can be no effective regulation of the predatory conduct demonstrated by the Petitioners and the incompetence demonstrated by their employees and physicians. If there can be no discovery of records which go to establish violation of law in a very high percentage of cases there can be no successful enforcement or prosecution under the law violated nor compensation for those injured. If the Petition for Certiorari is granted in this case as presenting an important Federal question which has not been clearly disposed of correctly by the Court below, this Court will have destroyed the humanitarian purpose that *Roe v. Wade* sought to create. In the process it will return abortion to its unseemly past.

B. *The Courts below have reached a correct result in this case.*

There should be no mistake as to the substance of the Petitioners' argument. Petitioners seek to create an absolute "testimonial privilege" for abortion patients under the guise of the right to privacy under the Fourteenth Amendment. (Pet. p. 14). Petitioners correctly note that Texas does not recognize at common law or by statute a privilege regarding

physician-patient communications. *Id.* Never has this Court sought to declare to the states the requirements or limits of an evidentiary privilege remotely approaching that advocated by the Petitioners. Traditionally, the states have been free to determine the standards and limits of evidentiary privileges as they may see fit. To bring this contention into sharp focus, if the contention advocated by the Petitioners is correct the finest hospitals and physicians in Texas that daily involve themselves in the most intimate aspects of a patient's life would have no evidentiary privilege to refuse to produce such records claiming a "right to privacy" on behalf of the patient, which is not recognized in Texas, while at the same time a so-called "free standing" abortion clinic would have such an absolute evidentiary privilege. The result to be sanctioned is even more curious in light of the fact that other than through the Deceptive Trade Practices Act and the licensing laws pertaining to medical professionals, Texas has no specific statute which regulates a free-standing abortion facility while it has numerous statutes which regulate hospitals and clinics. Since the Petitioners' clinic does not meet minimum requirements of State law to be classified as a hospital or clinic according to the Petitioners it cannot be regulated and its mistreatment of its patients cannot be discovered.

Finally, the specific objections of the Petitioners to the Order should be briefly noted. First, Petitioners complain that a number of patients are affected. Petitioners concede that a motion to certify a class of individuals is before the trial court and the State of Texas has intervened not only on behalf of the patients that have been injured in other clinics but in all other clinics in Texas as well. The trial court's Order requires the production of documents in which the patient claims to have had complications which are known in some instances to have resulted in death or serious

injury in the Defendants' Dallas facility and which have medical significance in a high percentage of cases when present. There is no contention that the production of these documents is impossible or oppressive; a substantial volume of them are available in a computer-assisted form; and in order to fairly evaluate and screen those injured and to confirm such other information such records are essential. Second, the Petition claims that production of records has "no relation to Mrs. Lott's case." The apparent defense in Mrs. Lott's case is that the acts complained of represented the negligence of only one physician and/or were an accident or honest mistake. The proof sought to be discovered by Mrs. Lott will establish so many such occurrences by other doctors as well as by Dr. Gardner that the jury will be justified in concluding this was not an isolated act of negligence but was part of a conspiracy between the named Defendants to violate the acts in question resulting in damages to Mrs. Lott and others. Of course, the State of Texas' interest is not limited to the City of Dallas but extends to the State as a whole as does that of the class to be represented in this catastrophe. Next Petitioners complain that the discovery Order does not permit the Petitioners discovery which they might desire to have. No such discovery has ever been requested by the Petitioners and it is available if it was requested.

Throughout the Petition it is claimed there are no fixed standards by which the trial court will judge how and under what circumstances the identities of patients will be released or protected. First and foremost, it would be impossible for any lower Court to summarize in a discovery Order the entire body of law which would bear upon whether the Plaintiff or the State have made the requisite showing of a compelling necessity for the production of documents in the hands of Petitioners. Neither the trial court nor the Supreme Court

of Texas has demonstrated any lack of judgment or knowledge as to the statutory and case authority which is involved in determination of discovery issues in this lawsuit. While a fertile imagination can conjure up thousands of hypothetical abuses which could occur in the final analysis, this Court cannot determine nor should it attempt to determine such a hypothetical circumstance. At this early stage in the litigation it would be premature and unwise for this Court to attempt to state or promulgate the law applicable to a civil discovery proceeding which has thus far been correctly and humanely decided by the Courts below. The final contention advanced by the Petitioners is that persons by virtue of discovery may be required to testify or reveal matters of a personal nature which such former patients or witnesses might prefer left unsaid or unanswered. No one can deny that in a hypothetical case under purely hypothetical facts that a hypothetical disruption may occur. The trial court has ample procedural and substantive devices to protect against and prevent all the hypothetical abuses imagined by the Petitioners. In addition, the trial court's decision and protective order, if this is the extraordinary case the Petitioners suggest, can be immediately reviewed for abuse by extraordinary means by the Supreme Court of Texas on an emergency basis. *Wallace v. Briggs*, 162 Tex. 485, 348 S.W. 2d 523 (1961); *Crane v. Tunks, supra*, and *Southern Bag & Burlap Co. v. Boyd, supra.* Moreover, the necessity for compulsory attendance and testimony of witnesses in civil and criminal cases is at the very heart of our adversary system of justice. The fact that a victim of a criminal offense may not wish to discuss the details of the crime or the identities of its perpetrators is no excuse or justification for requiring the State or those representing the innocent victim from doing their utmost to prosecute the guilty, prevent the reoccurrence of the offense, and to compensate for the injury to the fullest extent the law permits.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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